

LAW OFFICES OF STEPHEN M. MURPHY  
STEPHEN M. MURPHY (SBN # 103768)  
JEREMY A. GRAHAM (SBN # 234166)  
180 Montgomery Street, Suite 940  
San Francisco, CA 94104  
Tel: (415) 986-1338  
Fax: (415) 986-1231

LAW OFFICES OF DAVID M. PORTER  
DAVID M. PORTER (SBN # 124500)  
101 California Street, Suite 2050  
San Francisco, CA 94111  
Tel: (415) 982-8600  
Fax: (415) 391-9515

Attorneys for Plaintiff  
CHRISTINE DOUGHERTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTINE DOUGHERTY,

Plaintiff,

v.

AMCO INSURANCE COMPANY  
and DOES ONE through TWENTY,  
Inclusive,

Defendants.

NO. C 07-01140 MHP

**PLAINTIFF'S EX PARTE REQUEST TO  
CONTINUE HEARING ON MOTION FOR  
SUMMARY JUDGMENT**

1 **I. INTRODUCTION AND PROCEDURAL HISTORY.**

2 Plaintiff Christine Dougherty filed this action in the Superior Court of the State of  
3 California, City and County of San Francisco, on January 24, 2007 alleging causes of  
4 action for breach of contract and breach of the implied covenant of good faith and fair  
5 dealing against defendant AMCO Insurance Company based on their handling of her  
6 uninsured motorist claim. Defendant filed an answer in state court on February 23,  
7 2007 and February 26, 2007 removed the case to the United States District Court for  
8 the Northern District of California based on diversity jurisdiction.

9 The case was originally assigned to Judge Wayne D. Brazil. On May 31, 2007  
10 the case was reassigned to Judge Marilyn H. Patel. Judge Patel set the initial Case  
11 Management Conference for July 9, 2007. On June 22, 2007 defendant filed a motion  
12 for summary judgment noticed for hearing on July 30, 2007. Defendant filed its motion  
13 prior to the initial Case Management Conference without obtaining leave of the court  
14 as required by Judge Patel's standing orders. Although defendant has served its initial  
15 disclosures, there has been no formal discovery.

16 Due to the nature of an insurance bad faith claim, most of the evidence  
17 supporting plaintiff's allegations is in the exclusive possession of defendant.  
18 Therefore, it is only through the discovery process that plaintiff can obtain the evidence  
19 needed to oppose defendant's summary judgment motion.

20 Prior to filing this ex parte request plaintiff's counsel made repeated attempts to  
21 contact opposing counsel in order to obtain a stipulation to a continuance that would  
22 allow sufficient time for plaintiff to conduct discovery. Plaintiff's counsel received no  
23 response until shortly before filing this request and was not able to obtain defendant's  
24 consent to such a stipulation.

25 Because defendant's summary judgment motion is premature and was filed  
26 prior to the initial Case Management Conference without leave of the court in violation

1 of Judge Patel's standing orders, and because plaintiff has not had an opportunity to  
2 obtain evidence essential to its opposition through discovery, plaintiff requests that this  
3 Court continue the hearing on defendant's motion for summary judgment for a  
4 minimum of one-hundred and eighty days.

5 **II. A CONTINUANCE IS WARRANTED BECAUSE THE DEFENDANT'S FILING**  
6 **OF ITS MOTION FOR SUMMARY JUDGMENT VIOLATED JUDGE PATEL'S**  
7 **STANDING ORDERS.**

8 Judge Patel's standing orders state that "[m]otions to dismiss shall not be filed  
9 before the initial Case Management Conference except by leave of the court." (Chief  
10 Judge Marilyn Hall Patel, Standing Orders, Notices, ¶ 4.) Granting defendant's motion  
11 for summary judgment would have the same effect as a motion to dismiss and,  
12 therefore, defendant was not authorized to file its motion prior to the July 9, 2007 Case  
13 Management Conference absent leave of the court. Furthermore, Judge Patel's clerk  
14 represented to plaintiff's counsel that the requirement to obtain such leave applied to  
15 "all dispositive motions" and that defendant failed to obtain leave prior to filing its  
16 motion for summary judgment. (Declaration of Jeremy A. Graham in Support of  
17 Request to Continue Hearing on Motion for Summary Judgment ("Graham Decl.") at ¶¶  
18 1-2 & 6.)

19 By application of the Local Rules, plaintiff's opposition would be due on July 9,  
20 2007, twenty-one days prior to the hearing noticed for July 30, 2007, the same day as  
21 the initial Case Management Conference. (Local Rules 7-2, 7-3, and 56-1.) Because  
22 the filing of the motion was in violation of Judge Patel's standing orders however,  
23 plaintiff should not be required to file her opposition before the initial Case  
24 Management Conference. At the Case Management Conference the parties and  
25 Judge Patel should be afforded the opportunity to discuss whether a motion for  
26 summary judgment is appropriate given the early stage of the proceedings and, if so,  
to set the proper briefing schedule. Absent such a discussion and any subsequent

1 orders by the Court, a continuance of six months is necessary to protect plaintiff's  
2 ability to adequately oppose defendant's motion.

3 Plaintiff's counsel has left voice mail messages for opposing counsel over the  
4 course of three days, from June 25 to June 27, 2007, requesting that defendant  
5 stipulate to a continuance of the summary judgment motion. (Declaration of David M.  
6 Porter in Support of Request to Continue Hearing on Motion for Summary Judgment  
7 ("Porter Decl.") at ¶¶ 1-3.) Plaintiff's counsel received no response to these requests  
8 until after noon on July 27, 2007. As of the filing of this motion, defendant has not  
9 agreed to a stipulation for a continuance of its summary judgment motion. (Graham  
10 Decl. at ¶ 7.)

11 In the absence of such a stipulation, Judge Patel's clerk represented to  
12 plaintiff's counsel that filing an ex-parte request for a continuance was proper in light of  
13 the clear violation of Judge Patel's standing orders and the limited time remaining prior  
14 to the due date for plaintiff's opposition and the initial Case Management Conference.  
15 (Graham Declr. At ¶¶ 1-6.)

16 **III. A CONTINUANCE IS WARRANTED PURSUANT TO F.R.C.P. 56(f) TO**  
17 **ALLOW PLAINTIFF ADEQUATE TIME TO CONDUCT DISCOVERY.**

18 The Federal Rules of Civil Procedure authorize this Court to grant a  
19 continuance of a defendant's motion for summary judgement to allow plaintiff to  
20 conduct discovery in order to obtain evidence necessary to its opposition. F.R.C.P.  
21 56(f). To date, there has been no formal discovery by either party.

22 Under these circumstances, controlling authority mandates granting a  
23 continuance. "Although Rule 56(f) facially gives judges the discretion to disallow  
24 discovery when the non-moving party cannot yet submit evidence supporting its  
25 opposition, the Supreme Court has restated the rule as requiring, rather than merely  
26 permitting, discovery 'where the non-moving party has not had the opportunity to  
discover information that is essential to its opposition.'" *Metabolife Int'l, Inc. v.*

1 *Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (emphasis added; citing *Anderson v.*  
2 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

3 Additionally, where the court retains its discretion the Ninth Circuit has adopted  
4 a liberal approach to granting a continuance. “Where . . . a summary judgment motion  
5 is filed so early in the litigation, before a party has had any realistic opportunity to  
6 pursue discovery relating to its theory of the case, district courts should grant any Rule  
7 56(f) motion fairly freely.” *Burlington Northern Sante Fe Railroad Co. v. the Assiboine*  
8 *and Sioux Tribes of the Fort Peck Reservation, Montana*, 323 F.3d 767, 773-774 (9th  
9 Cir. 2003) (citing *Metabolife Int'l, Inc., supra.*, 264 F.3d at 846; *Wichita Falls Office*  
10 *Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992) (Rule 56(f)-based  
11 “continuance of a motion for summary judgment for purposes of discovery should be  
12 granted almost as a matter of course unless the non-moving party has not diligently  
13 pursued discovery of the evidence” (internal quotation marks and citation omitted));  
14 and *Sames v. Gable*, 732 F.2d 49, 52 (3rd Cir. 1984) (same)).

15 Here, defendant has alleged a claim for bad faith in the handling of an  
16 insurance claim. Most of the evidence which would demonstrate bad faith is  
17 necessarily in the exclusive possession of the insurer. The “allegations which assert  
18 such a [bad faith] claim must show that the conduct of the defendant . . . demonstrates  
19 a failure or refusal to discharge contractual responsibilities, prompted not by an honest  
20 mistake, bad judgment or negligence but rather by a conscious and deliberate act,  
21 which unfairly frustrates the agreed common purposes and disappoints the reasonable  
22 expectations of the other party.” *Chateau Chamberay Homeowners Assn. v.*  
23 *Associated Internat. Ins. Co.*, 90 Cal.App.4th 335, 346 (Cal.App. 2001).

24 Plaintiff will require the opportunity to conduct extensive discovery in order to  
25 obtain evidence that defendant’s conduct alleged in her complaint was conscious and  
26 deliberate. Plaintiff anticipates that a minimum of six months will be required to take  
depositions of defendant’s employees, serve document requests, interrogatories, and

1 requests for admissions, and to resolve any discovery disputes that may arise.

2 **IV. CONCLUSION.**

3 For the foregoing reasons, plaintiff Christine Dougherty requests that this Court  
4 continue the hearing on defendant AMCO Insurance Co.'s motion for summary  
5 judgment currently set for July 30, 2007 for one-hundred and eighty days or such other  
6 time as deemed appropriate by the Court.

7 Dated: June 27, 2007

LAW OFFICES OF STEPHEN M. MURPHY

9 By: /s/ Stephen M. Murphy  
10 STEPHEN M. MURPHY  
11 Attorney for Plaintiff  
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